COMPETITION ISSUES IN THE AUSTRALIAN TELECOMMUNICATIONS MARKET

A WHITE PAPER PREPARED FOR AND SUBMITTED TO THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

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EXECUTIVE SUMMARY

In February 1997, Australia became a signatory to the World Trade Organization ("WTO") Basic Telecommunications Agreement, as well as to the accompanying Reference Paper concerning pro-competitive regulatory principles. That same year, Australia enacted legislation that opened its telecommunications market to full competition and undertook to incorporate its WTO commitments. Four years later, however, it is clear that Australia has not lived up to the commitments it made to its WTO trading partners. While most licensing barriers to market entry have been largely eliminated, Australia's current telecommunications regulatory environment has created – and even exacerbated – numerous regulatory and economic barriers to market entry and the development of effective competition. Indeed, today several aspects of Australia's current regulatory regime contravene its WTO commitments.

These problems include:

- The inability of Australian regulators to curb anti-competitive behavior by dominant incumbent Telstra, such as
  - delaying or denying access to its legacy network;
  - charging wholesale rates far in excess of its costs;
  - bundling competitive and monopoly services;
  - exploiting its position to gain unfair leverage in negotiations;
  - refusing to enter into peering arrangements for ISP traffic;
  - imposing unnecessary and time-consuming technical certification requirements.

- The inability of Australian regulators to resolve disputes concerning interconnection with Telstra (some of which have been pending since 1997 and remain unresolved);

- The inability of Australia's regulators to establish rates for network access and interconnection that are *final* and *cost-based*;

- Telstra wholesale local loop access rates that are substantially higher than Telstra's retail end-user rates for local access;

- Telstra fixed-to-mobile wholesale rates for terminating calls on Telstra's mobile network that greatly exceed the rates Telstra charges to its own retail fixed-line customers;

- Australia's refusal to require line sharing;

- The lack of a Reference Interconnection Offer for Telstra, access to any of Telstra's existing interconnection agreements, or any clear and coherent guidance concerning interconnection and network access;

- A dysfunctional dispute resolution and appeals process that is unduly burdensome, time-consuming, expensive, and creates additional regulatory and market uncertainty; and

- The lack of a truly independent regulator in an environment where the incumbent is still majority-owned by the government.

As a result of Australia's failure to meet its WTO commitments, competitive telecommunications carriers, including several with substantial U.S. investment, have been seriously impeded in their ability to compete in the Australian market. We therefore request the USTR to engage in discussions with the Australian government directed at bringing Australia into compliance with its WTO commitments and ensuring fair and effective competition in the Australian telecommunications market. The upcoming negotiations for a possible US-Australia Free Trade Agreement will provide an excellent forum for such discussions and will hopefully result in meaningful progress.

In discussions with the Australian government, the USTR should encourage Australia to:

- *Dispute Resolution.* Push forward on its recently proposed reforms to its dispute resolution process for the telecommunications sector;

- *Final, Cost-Based Rates.* Establish rates for access to and interconnection with Telstra's network that are *final* and *cost-based*, including the establishment of actual cost-based wholesale rates for local loop access;

- *Enforcement Authority over Telstra.* Increase the power and ability of Australia's regulators to crack down on Telstra's anti-competitive behavior and practices;

- *Interconnection Guidelines.* Establish clear, transparent guidelines on interconnection, including publication of a reference interconnection offer and/or Telstra's existing interconnection agreements; and

- *Independent Regulatory Authority.* Establish a truly independent regulatory authority.

BACKGROUND OF TELECOMMUNICATIONS REGULATION

The Australian telecommunications market was initially opened to competition in 1991 for resale services and the construction of infrastructure, and was opened to full competition in 1997 with the passage of the Telecommunications Act 1997. Prior to 1997, Telstra Corporation Ltd. ("Telstra") and Optus Pty Ltd., which later became Cable & Wireless Optus Administration Pty Ltd. ("Optus"), had maintained a duopoly on facilities-based services. Since 1997, Australia has eliminated virtually all barriers to licensing and has granted individual carrier licenses to over 60 additional carriers. However, of these 60-plus licensees, only a small handful have operations of any substance, due to other significant barriers imposed by regulatory processes and a lack of effective control on former monopoly provider Telstra. These barriers are preventing the development of successful and sustainable competition and are the topic of this White Paper.

A significant feature of the Australian telecommunications regime is its division of regulatory oversight between two separate agencies, which have different but overlapping responsibility, as well as its delegation of some policy-making and oversight functions to non-government organizations. Australia's regulatory scheme includes special regulation of telecommunications providers with market power (such as Telstra), most of which is found in special telecommunications provisions of Australia's general competition law.

I. Regulatory Authority and Oversight

The telecommunications industry in Australia is overseen primarily by two regulatory bodies, the Australian Communications Authority ("ACA") and the Australian Competition and Consumer Commission ("ACCC"). The ACA was formed in 1997 and is responsible for licensing carriers, ensuring compliance with license conditions and service provider rules, monitoring service performance and quality, establishing and enforcing technical standards, consumer protection, universal service obligations and managing the national numbering plan. The ACA is also charged with radiofrequency spectrum management, including licensing, interference issues, and advising the Australian government on spectrum usage. The ACA reports to the Minister in charge of Australia's telecommunications policy-maker, the Department of Communications, Information Technology and the Arts ("DCITA"), which is described in more detail below.

The ACCC is responsible for regulating competition in Australia, including in the telecommunications sector, and has primary responsibility for regulation of telecommunications operators with a substantial degree of market power in Australia. Its major responsibilities include the regulation of anti-competitive conduct and administration of Australia's telecommunications access regime. The latter function gives the ACCC responsibility for interconnection and access issues (including local loop unbundling) and for arbitrating access-related disputes. The ACCC also is responsible for administering price control regulations in relation to Telstra's retail services and determining whether, and to what extent, individual service providers are required to file tariffs and reports and follow the ACCC's record keeping rules. The ACCC's mandate gives it broad powers in regulating the Australian telecommunications industry, including the power to direct the ACA to mandate local number portability and other measures designed to foster competition in the telecommunications market.

The ACCC, which used to report to the Attorney General, now reports to the Treasury Department.

Australia's policy-making body for the telecommunications sector is the DCITA. The DCITA (together with the Department of Finance and Administration) administers the Australian government's majority shareholding of Telstra, and the Minister who heads the DCITA (currently, Senator Richard Alston) also serves as Parliament's Minister for Telstra and as the voting shareholder on behalf of the Australian Commonwealth. The DCITA advises the government on telecommunications policy issues such as competition, price regulation, universal service, consumer safeguards, and obligations under international telecommunications agreements.

Both the ACA and the ACCC receive assistance and input from certain non-governmental industry and interest groups. The most significant of these are (i) the Australian Communications Industry Forum ("ACIF"), an industry group responsible for developing technical, operational and consumer codes and standards for the industry; (ii) the Telecommunications Access Forum ("TAF"), an industry group sanctioned by the ACCC that provides recommendations and guidance as to which services should be subject to the telecommunications access regime; (iii) the Telecommunications Industry Ombudsman ("TIO"), an independent dispute resolution forum for complaints against service providers by residential and small business users; and (iv) the Australian Telecommunications Users' Group ("ATUG"), a national organization whose goal is to ensure access to a wide range of high-quality, low-cost telecommunications services for users throughout Australia. Other organizations include the Service Providers Access Network ("SPAN"), the Consumers Telecommunications Network ("CTN") and the Internet Industries Association ("INTIA"). Although these organizations are not government agencies, they can influence policy decisions, interpretations and implementation. Recently, several of these organizations have seen their influence diminished, and individual carriers have had to directly lobby the ACCC and DCITA.

II. Legal Basis of Telecommunications Regulation

A. The Telecommunications Act 1997 and the Trade Practices Act 1974

In 1997, Australia enacted two significant pieces of legislation relating to the telecommunications sector: the Telecommunications Act 1997 ("Telecommunications Act") and Parts XIB and XIC of the Trade Practices Act 1974 ("Trade Practices Act"). The Telecommunications Act sets forth the system for regulating telecommunications in Australia, including carrier licensing, service provider licensing, technical standards, and other matters. The Telecommunications Act also assigns regulatory responsibility between the ACA and the ACCC.

The Trade Practices Act sets forth the competition rules for the Australian telecommunications sector. The Trade Practices Act, which also is the source of Australia's general competition laws, was modified in 1997 with the additions of Parts XIB and XIC, which are specific to the telecommunications industry and which define the ACCC's regulatory powers in telecommunications matters. Part XIB focuses on anti-competitive conduct and record-keeping rules, including tariff filing requirements. Part XIC sets forth Australia's Telecommunications Access Regime, which is administered by the ACCC and covers access to

networks and network elements, interconnection, pricing and operator obligations. Both parts also include provisions on procedures, enforcement, and penalties that may be imposed. In addition, please note that telecommunications operators, like all Australian businesses, are subject to the entire Trade Practices Act, including its provisions on restrictive trade practices and consumer protection.

B. Licensing of Telecommunications Services

A telecommunications operator who owns "network units" (*i.e.*, transmission facilities)[1] must obtain a carrier license in order to use its network units to provide service to the public in Australia. Australia's license regime makes little distinction between wireline carrier and mobile carrier licenses, although certain wireless services, such as fixed wireless access, also are subject to spectrum licensing and other requirements under the Radiocommunication Act. Carriers are subject to the standard carrier license conditions listed in Schedule 1 of the Telecommunications Act[2] and to certain provisions of the Trade Practices Act. All other operators are classified as service providers and do not require a license. Service providers that serve end-users are required to register with the Telecommunications Industry Ombudsman, and all service providers must comply with the obligations set forth in Schedule 2 of the Telecommunications Act.[3] Service providers are further divided into carriage service providers ("CSP"), which supply communications services to the public over leased or resold transmission facilities, and content service providers.[4]

C. Enforcement of Competition Rules

An investigation as to whether an operator is engaging in anti-competitive practices can be initiated either as a result of a petition of an interested party or on the ACCC's own initiative. As a result of its investigation, the ACCC may issue either a "Part A" or a "Part B" competition notice. Part A notices are used when the ACCC has reason to believe that the operator has engaged, or is engaging, in anti-competitive conduct. Part A notices do not need to specify the conduct or provide extensive details. A Part A notice will describe the type of conduct at issue and will state a time frame during which the notice will be in effect. Once a Part A notice has been issued, third parties have the right to seek injunctive relief against the conduct described in the notice. Also, if an operator that has received a Part A notice continues to engage in the conduct addressed in the notice while the notice is still in effect, the operator may be subject to various ACCC sanctions, including fines of up to AU$10,000,000 plus AU$1,000,000 for each

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[1]/ "Network units" refer to different categories of transmission facilities ranging from a single fixed line over 500 meters long to mobile network base stations. The definition of network units does not include switching facilities.

[2]/ Examples of Schedule 1 carrier license obligations include having a current industry development plan on file, providing other carriers access to facilities and certain network information, and complying with the ACCC's Standard Access Obligations.

[3]/ Examples of Schedule 2 obligations include providing operator service to end-users of standard telephone service, providing access to end-users of other service providers, providing directory assistance and itemized billing to end users, and supplying Telstra with the information necessary to maintain the integrated public number database.

[4]/ CSPs may own and operate switches and switching equipment; content service providers may not.

day that the conduct continues or other specific orders, such as the nullification of contracts. In addition, third parties may seek damages or other compensation from the operator.

The ACCC also has the option of issuing a Part B competition notice to an operator. Part B notices must be much more specific as to the conduct in question and contain more detailed information; however, they also serve as *prima facie* evidence before a court of the alleged violations. Third parties may also seek damages or other compensation once a Part B notice has been issued, rather than wait for a subsequent violation of the notice by the operator.

D. Classification of Dominant Operators

As stated above, competition regulation, including regulation of dominant operators such as Telstra, is provided for primarily in the Trade Practices Act and administered by the ACCC. The Trade Practices Act does not utilize terms such as "dominant carrier" or "dominant licensee;" rather, it refers to entities that have a "substantial degree of power" in a given telecommunications market. Under the Trade Practices Act, both carriers and CSPs (hereinafter referred to collectively as "operators") are subject to special regulation if they are determined to have a substantial degree of market power. Currently, Telstra is subject to such regulation because it retains a substantial degree of market power.

A determination that a carrier holds a substantial degree of power in a telecommunications market may be made either at the ACCC's initiative or upon petition by an interested party. In general, these determinations are made as the result of a dispute between carriers, a complaint against a carrier alleging that it is engaging in anti-competitive conduct, or as part of the ACCC's review of a merger or acquisition. In order to make this determination, the ACCC performs a market analysis that first determines the relevant telecommunications market, then looks to the degree of power that the carrier in question holds in that market.

Australia has not set a market share threshold as to when an operator has a "substantial" degree of power in a telecommunications market, but rather makes this determination on a case-by-case basis. As the former monopoly operator, Telstra has been presumed to have a substantial degree of power and has been regulated accordingly. Telstra has not yet challenged this presumption. In addition, Telstra also is subject to various legislative provisions which address Telstra specifically.

AUSTRALIA'S WTO COMMITMENTS

On February 15, 1997, Australia joined 68 other nations, including the United States, in concluding the WTO Basic Telecommunications Agreement and committed to open its market for basic telecommunications services. Australia also joined the United States and 52 other countries in undertaking additional specific commitments concerning pro-competitive regulatory principles, which are contained in a document known as the "Reference Paper." The Reference Paper contains principles relating to competition safeguards, interconnection, universal service, transparency of licensing criteria, independence of the regulator and allocation of scarce resources (*e.g.*, spectrum and numbering). Failure to abide by the terms of the Reference Paper would make a country subject to enforcement action at the WTO. The legislation described in Part II.A. of the Background section was adopted within the framework of these commitments.

In becoming a signatory both to the WTO Basic Telecommunications Agreement and the Reference paper, Australia has made enforceable commitments to its trading partners with regard to telecommunications. Specifically, Australia has committed to have in place competitive safeguards, a fair and reasonable interconnection regime, and an independent regulator.[5]

I. Competitive Safeguards

1.1 *Prevention of anti-competitive practices in telecommunications*

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 *Safeguards*

The anti-competitive practices referred to above shall include in particular:

(a) *engaging in anti-competitive cross-subsidization;*

(b) *using information obtained from competitors with anti-competitive results; and*

(c) *not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.*

- WTO Reference Paper

In becoming a signatory to the Reference Paper (from which the passage above was extracted), Australia made a commitment to maintain and enforce appropriate measures to prevent dominant carriers (*i.e.*, Telstra) from "engaging in or continuing anti-competitive practices." As discussed in the Background section above, Australia codified competition

[5] / A copy of Australia's Schedule of Specific Commitments to the WTO, including a complete copy of the Reference Paper with Australia's comments and reservations, is attached as Exhibit 1.

regulation of the telecommunications sector with its 1997 modifications of the Trade Practices Act, including the addition of Parts XIB and XIC, which are specific to telecommunications.

The "Competition Rule" in Part XIB of the Trade Practices Act prohibits anti-competitive conduct and applies to all operators in Australia, regardless of market power. Prohibited conduct includes but is not limited to (i) contracts, arrangements or understandings that restrict or substantially lessen competition; (ii) covenants that substantially lessen competition; (iii) exclusive dealing; and (iv) resale price maintenance. However, the ACCC may, upon petition, issue an exemption order for a specific transaction if it determines that the public interest or benefit of the conduct in question outweighs any public detriment that would result, or that the specific conduct is not anti-competitive.

In addition to the practices above, operators who are found to have a substantial degree of power in a specific market are prohibited from taking advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market. Operators with a substantial degree of power in a market are also prohibited from taking advantage of that power with the purpose of:

- eliminating or substantially damaging a competitor in that or any other market;
- preventing the entry of a person or entity into that or any other market; or
- deterring or preventing a person or entity from engaging in competitive conduct in that or any other market.

Despite the full liberalization of the Australian telecommunications market in 1997, and the passage of the above laws supposedly to protect competition, Telstra has still managed to leverage its former monopoly status and engage in anti-competitive conduct in order to maintain its dominant position. The government has done little to keep Telstra from continuously delaying or denying access to its network, charging wholesale rates for access and services far in excess of its costs, and exploiting Australia's regulatory procedures and process to prevent or delay unfavorable access and pricing decisions from coming into effect, in some cases for up to five years. Not only have these actions significantly raised the cost of entry for competitors, but Telstra has been able to further undermine competition by using its excessive, non-cost-based wholesale rates to cross-subsidize its retail rates.

Telstra has also continued to use its overwhelming market dominance – including its near-total control of the country's local access lines – and its vast, state-supported resources as unfair leverage in negotiations with competitive operators. Telstra's negotiating leverage is further increased by a dispute settlement process that is unduly burdensome, in terms of both time and resources, and which is wholly ineffective in creating either market certainty or in preventing Telstra from engaging in similar behavior in the future. Australia's own competition watchdog acknowledges many of these problems, yet finds itself bound by the procedures it must follow and the limited scope of its powers.

A. Network Access

Telstra is required to provide competitors with cost-based local access services, including, as of August 2000, access to the unbundled local loop ("ULL"), a required element for the provision of DSL and other competitive local services in Australia. However, Telstra's prices for ULL access are unreasonably high and well in excess of Telstra's costs. Currently, Primus reports that Telstra charges it between AU$ 38.25 – 63.25 per month for ULL access. Although there is an on-going arbitration that is expected to reduce these rates by approximately 30 percent, even such a reduction will still result in rates in excess of Telstra's costs. Also, as discussed in more detail in Part II.B. below, Australia's current arbitration and dispute resolution process is deeply flawed, and the actual implementation of any reduced ULL rates could be delayed indefinitely. In the meantime, Telstra has been aggressively rolling out its own retail DSL services, while its potential competitors have been saddled with prohibitively high DSL roll-out costs (due to Telstra's ULL access rates), as well as no alternative to ULL access for the provision of DSL services.

Furthermore, despite the worldwide trend of decreasing local access prices, Telstra has *increased* its local line rental prices by over 70 percent over just the past year.[6] Telstra's retail monthly line rental rates are now AU$ 16.90 – 21.90 for residential customers and AU$ 31.95 – 36.95 for business customers.[7] However, according to industry sources, Telstra charges wholesale rates of AU$ 19.90 for residential line rentals and AU$ 33.95 for business line rentals. The anti-competitive effects of this disparity are clear: with wholesale rates at or near the top end of Telstra's retail price range, retail rates charged by competitive operators must either match *or exceed* Telstra's rates in order for the competitor simply to break even. Yet if other operators want to be price-competitive, they will be forced to offer these services at an unsustainable loss.[8]

The disparity between Telstra's wholesale and retail local access prices demonstrates Telstra's failure or refusal to charge cost-based wholesale rates for either local line rentals or ULL access, as well as the inability or unwillingness of the Australian regulators to bring Telstra

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[6] / ACCC Media Release MR 185/01, *ACCC Expresses Concern as Telstra Further Increases Line Rental Charges*, August 10, 2001.

[7] / These are the rates as published on Telstra's website at http://www.telstra.com.au/products/catalogue.cfm as of September 1, 2001.

[8] / On August 22, 2001, the ACCC announced that it currently would not consent to Telstra's latest proposal to increase line rental rates by an additional AU$ 2.40. However, the ACCC did not object to either the rates or their anti-competitive effects, but rather to the fact that Telstra is not adequately promoting its low-rate "HomeLine Budget" retail service offering in its advertising! In effect, the ACCC has told Telstra that it may increase its line rental rates if it does a better job of promoting those retail rates that *undercut* its wholesale rates to competitors! *See* ACCC Media Release MR 197/01, *Line Rental Charge: ACCC Concerns*, August 22, 2001.

On August 28, 2001, the ACCC announced that Telstra offered to change its marketing of its "HomeLine Budget" plan by eliminating the AU$ 2.00 monthly fee to participate in the plan, which offers a line rental rebate of AU$2.20 per month for customers with a total monthly bill of AU$ 25.30 or less, and by increasing the plan's prominence in Telstra's marketing materials. The ACCC accepted Telstra's offer and approved Telstra's plan to increase its line rental rates by AU$ 2.40 per month effective September 1, 2001. *See* ACCC Media Release MR 202/01, *ACCC Gets an Improved Offer for Telstra Low-Bill Customers on Line Rental Increase*, August 28, 2001.

into compliance with Australia's WTO commitments concerning cost-oriented rates.[9] It also clearly demonstrates Telstra's ability to unfairly cross-subsidize its retail business with high wholesale rates. As a result, local access is prohibitively expensive for new market entrants, thus effectively blocking the introduction of competitive local services, including competitive DSL, in Australia.[10]

Line sharing also is not an option for new entrants seeking to provide services such as DSL in the Australian market. Telstra argued before the ACCC that line sharing would cause harm to Telstra's network and should not be permitted, even though line sharing has been successfully implemented over legacy networks throughout the United States and Europe. However, the ACCC agreed with Telstra's assertions and refused to require line sharing, thus eliminating for new entrants the only alternative to the prohibitively expensive unbundled local loop.

On July 4, 2001, Telstra announced that it will offer line sharing after all. However, Telstra will not provide any details about when line sharing will become available or the prices or features of the line sharing product. The only information currently available is that line sharing *may* be available in a year or so, unless the ACCC and the TAF take action.

Telstra is also taking unfair advantage of its roles as the dominant local access provider and as a major player in the mobile telephony market by charging its competitors wholesale fixed-to-mobile termination rates that are far in excess of its retail rates for its own fixed-line customers. This service, known as "fixed to mobile" ("FTM"), is the rate for terminating calls from a fixed-line network to MobileNet, Telstra's mobile network. For its own fixed-line customers, Telstra charges a per-minute retail rate for FTM calls that is capped at AU$ 2.97 total for off-peak calls lasting up to three hours.[11] For some Telstra subscribers, this cap can be as low as AU$ 1.98.[12] However, Telstra charges its fixed-line competitors a wholesale rate for FTM of approximately AU$ 0.25 per minute without any caps at all. Therefore, when a subscriber of Primus or another fixed-line competitor places a call to a number on Telstra's mobile network, the *wholesale* cost of that call will exceed Telstra's retail cap after the twelfth minute. As a

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9/ *See, e.g.*, Reference Paper § 2.2 (b) (Exhibit 1).

10 / On September 7, 2001, the ACCC issued a Competition Notice to Telstra after determining that Telstra is engaging in anti-competitive conduct in the provision of ADSL services to competitors. *See* ACCC Media Release MR 214/01, September 7, 2001. Among the ACCC's findings: (i) Telstra supplies wholesale ADSL services at prices that make it impossible for competitors to compete with Telstra's retail prices; (ii) Telstra refuses to restructure its wholesale ADSL service in a way that would allow competitors to provide retail services different than what Telstra provides (*i.e.*, video on demand, voice over Internet); and (iii) Telstra refuses to configure its wholesale ADSL service in a way that would allow competitors to offer different service quality levels than Telstra's retail product.

Telstra has 12 weeks to change its conduct, after which competitive ISPs and carriers can take court action against Telstra for damages. The ACCC will also be able to seek penalties of up to AU$ 10,000,000 plus an additional AU$ 1,000,000 for each day that the conduct continues.

11 / *See* http://www.telstra.com.au/products/catalogue.cfm (as of September 1, 2001).

12 / *Id.* (this cap is available to subscribers of Telstra's HomeLine Plus residential plan or Telstra's BusinessLine Plus business plan).

result, a three-hour call to a Telstra mobile number would cost a Telstra retail subscriber AU$ 2.97, whereas the same call from Primus' network would cost Primus AU$ 45.00 *wholesale*, or *fifteen times* as much as Telstra's retail price.

Although Telstra's wholesale FTM rate of AU$ 0.25 per minute is in line with the initial retail benchmark price as determined by the ACCC in July 2001,[13] the steep discounts Telstra offers to retail subscribers of its own fixed-line network are clearly discriminatory and anti-competitive. Telstra's mobile network operations enjoy nationwide coverage and a share of Australia's mobile market of over 46 percent (approximately 4,770,000 subscribers)[14], thus making it vital for fixed-line service providers to be able to provide FTM services to Telstra's mobile network at non-discriminatory rates in order to compete. Under the current pricing structure, competitors must either charge their customers FTM rates far in excess of Telstra's retail rates or absorb tremendous losses of anywhere from AU$ 0.25 to AU$ 42.00 *per call* and therefore cannot possibly compete with Telstra.

The need for fair, non-discriminatory pricing in the termination rates for fixed-to-mobile calls to Telstra's MobileNet numbers is further demonstrated by Telstra's most recently-announced financial results for the year ending June 30, 2001. According to Telstra's reports, Telstra's number of fixed to mobile minutes increased by 8.6 percent to 3.26 *billion* minutes over the year, with fixed-to-mobile revenue of AU$ 1.28 billion.[15] The ability of an incumbent operator to freely engage in anti-competitive discriminatory behavior in such a large market clearly violates the commitments Australia made to the WTO in 1997.

Telstra has also refused to provide ISDN access to competitors, as it is required to do under Australian law (see Part II.A. below). Although ISDN is the preferred access method for business customers, Telstra does not permit carrier preselection on ISDN-originated traffic. There is no technical reason for this restriction, and the lack of preselection for ISDN access places Telstra's competitors at a severe disadvantage in the business access market. Further, Telstra offers a flat rate ISDN data access product on a retail basis, but refuses to offer a corresponding wholesale access product. This makes it effectively impossible for other operators to compete with Telstra in the provision of ISDN data access.

Telstra has also refused to enter into peering arrangements with other major carriers of ISP traffic. For example, in 1998, iPrimus (Primus' Australian ISP) introduced a fixed rate plan for Internet access, which would provide customers with unlimited Internet access for AU$ 24.95 per month. In response, Telstra has adopted a fixed-rate Internet access plan similar to the plan offered by iPrimus. As a result of the introduction of the fixed-rate plan, Telstra refused to peer with Primus – the third-largest ISP in Australia – even though Telstra has entered into peering arrangements with Optus, Connect and Ozmail. This retaliatory action has placed

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[13] / *See* Australian Competition and Consumer Commission, *Pricing Methodology for the GSM Termination Service: Final Report*, July 2001.

[14] / *Id.* at 34.

[15] / Ouida Taaffe, *Telstra Beats Analysts' Expectations*, Total Telecom, August 29, 2001 (available online at http://www.totaltele.com) (Exhibit 2).

Primus in the uncompetitive position of having to pay Telstra AU$ 0.0295 per megabyte *regardless of the direction of traffic.*[16]

The Reference Paper's prohibition on anti-competitive conduct also is violated by the technical certification requirements new entrants must undergo before they can connect their equipment with Telstra's network. Telstra, with the consent of the Australian government, insists that it must do its own tests of competitors' equipment before it can be connected, even if this equipment already meets internationally-recognized type certification criteria. However, these tests take approximately eight to nine months to complete, thus adding to the delays and costs of entering the market.

Australia's system for arbitrating interconnection and network access disputes between telecommunications service providers, which is discussed in more detail in Part II.B. below, gives Telstra even further opportunities to engage in anti-competitive conduct by providing Telstra with confidential information about its competitors while in turn protecting information about Telstra. This is a result of Australia's regulations, which require that arbitration proceedings and results be limited to the two negotiating parties and that the decisions be kept confidential. As discussed later in this paper, this system means that each competitor must go through the time and expense of relitigating issues that have already been decided in previous arbitrations.

This system also has the anti-competitive effect of allowing Telstra, in the course of negotiations or arbitration with an operator, to use information obtained during arbitration with another operator. Telstra has significant leverage in its negotiations with other operators, since Telstra already knows -- from previous arbitrations it has been party to -- how the ACCC is likely to rule on certain disputed issues. The competitive operator, however, is barred by law from acquiring the same information and therefore has no way to verify or refute assertions made by Telstra during the course of negotiations. This both increases Telstra's ability to negotiate on an "our way or no way" basis and reduces the likelihood that a new entrant would be willing to undergo the tremendous expense of arbitrating issues that, for all it knows, have already been decided against it.

B. Price Regulation

In order to foster competition, the ACCC can impose price regulation either on an individual operator or a class of operators. These price regulations can apply regardless of whether an operator is dominant or non-dominant. For example, on March 20, 2001, the ACCC issued its formal position on the appropriate pricing by non-dominant operators for PSTN originating or terminating services, which underlie nearly all telecommunications services.[17] The ACCC has adopted the position that prices charged for these services by non-dominant operators should be equal to or less than Telstra's "efficient cost" for such services. The ACCC has stated that, in conducting arbitrations or reviewing proposed standard offers, it "is unlikely to accept a charge for [PSTN originating and terminating services] that was higher than the efficient cost incurred by Telstra for the supply of an analogous service."[18]

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[16] / This rate was only just recently reduced from AU$ 0.04 per megabyte.

[17] / ACCC, *Pricing Principles Paper: Pricing guidelines for access prices of PSTN terminating and originating access services provided by non-dominant or smaller fixed networks*, March 2001.

The ACCC further stated that this "in effect imposes a price ceiling in negotiations for the supply of PSTN originating and terminating services by a smaller or non-dominant fixed network" operator.[19] The ACCC's stated purpose for adopting this position is to encourage and reward "efficient facilities-based entry" by competitive operators and "efficient use and investment in infrastructure."[20]

In addition to giving Telstra additional leverage in interconnection negotiations by essentially taking these prices off the table, the ACCC's decision has also created additional uncertainty. The ACCC is responsible for determining what Telstra's efficient costs are: however, the ACCC's latest cost determination was appealed by Telstra in October 2000 to the Australian Competition Tribunal ("ACT") and, according to the ACCC, these appeals are not expected to be decided "until mid-2002 at the earliest."[21] This effectively prevents competitive operators from knowing for at least another year not only what rates they must pay Telstra, but also what prices they themselves may charge.

In addition to the ACCC's price regulations, Telstra is also subject to price regulation by the ACA, which has the authority to impose price controls, including price caps, on Telstra under Part 9 of the Telecommunications (Consumer Protection and Service Standards) Act 1999 ("Part 9"). Part 9 prohibits Telstra from changing the prices of any service designated by the ACA as capped without the ACA's permission. Retail services that are capped under Part 9 currently include business and residential line rentals and call charges. However, even with these caps, line rental rates have increased by 70 percent between 1998 and 2001.[22]

C. Enforcement

Finally, the ACCC, Australia's competition watchdog, has found it very difficult to enforce Australia's telecommunications competition rules against Telstra. Telstra has successfully used Australia's administrative appeals process to delay the effect of adverse rulings for years. As discussed above, the ACCC announced last year that it had at last issued final decisions in two long-running interconnection arbitrations, yet has Telstra appealed these decisions and, according to the ACCC, the ACT is not expected to decide these appeals "until mid-2002 at the earliest."[23] As another example, competitive operator One.Tel entered into arbitration with Telstra in 1997 over interconnection and access fees, with the case now pending

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[18] / ACCC Media Release MR 57/01, *ACCC Issues Position Paper on Access Pricing Principles for Non-Dominant Telephony Networks*, March 20, 2001.

[19] / *Id.*

[20] / *Id.*

[21] / ACCC Media Release MR 117/01, *ACCC Issues its Views on Access Pricing to Encourage Negotiated Settlements Over Access to Telstra's Fixed Network in 2001-2002*, May 18, 2001.

[22] / *See* fn. 6.

[23] / *See* fn. 21.

before the ACT over four years later. Meanwhile, One.Tel filed for bankruptcy in May 2001 -- while still waiting for a decision from the ACT -- and has been forced out of the market.

The ACCC also finds it difficult to bring or maintain action against Telstra for competition law violations. Currently, the ACCC can only take action if it can prove that Telstra's conduct had an anti-competitive *purpose*, which is a far higher burden than showing that the conduct had an anti-competitive *effect*. The ACCC is reported to be seeking changes in the law to allow it to take action against Telstra upon a showing that the conduct in question had an anti-competitive effect. This would give the ACCC more sufficient power to restrain Telstra and protect competition in Australia's telecommunications market.

Unfortunately, many of the reforms sought by the ACCC concerning its role in telecommunications regulation, such as an increase in the scope of its powers and streamlining of the arbitration and appeals processes, must come through the DCITA which, as previously discussed, is also the agency responsible for representing the Australian government as Telstra's majority shareholder.

II. Interconnection

2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided:

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction necessary additional facilities.

2.3 Public Availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.

2.4 *Transparency of interconnection agreements*

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

- WTO Reference Paper

Australia has committed to ensure interconnection with incumbent Telstra at any technically feasible point in its network in accordance with the conditions of the Reference Paper listed above. In adopting the Reference Paper, Australia stated that its interconnection regime "will provide access on terms and conditions which are fair and reasonable to all parties and which do not unfairly discriminate between users."[24]

Australia's adoption of the Reference Paper includes reservations stating that interconnection matters such as the terms and conditions of access are to be determined primarily through commercial negotiation or through reference to a standard interconnection offer. Such a standard reference interconnection offer would be subject to approval by "the independent regulator."[25] Australia also stated that interconnection rates are to be determined by negotiation, although both parties would have access to an "independent arbitrator which will make a decision based on transparent criteria to ensure that rates are fair and reasonable in the circumstances."[26] The independent arbitrator would also be responsible for determining what costs are relevant in determining cost-oriented rates.

Despite the commitments made to the WTO under the terms of the Reference Paper, Australia's access regime still contains many barriers to new market entry and the development of effective competition. Telstra remains dominant in every market and still controls approximately 95% of the country's local access lines, thus requiring anyone wishing to enter the market to interconnect with Telstra. However, Telstra has established an interconnection scheme that is costly and burdensome, and the government has failed to take the actions necessary to improve it. New entrants have no alternative to this scheme, since Australia has neither an "opt-in" system (which would allow new entrants to opt in to an existing interconnection agreement) nor an approved reference interconnection offer for Telstra.

Telstra's document on interconnection prices and procedures alone is 100 pages long, and Telstra's requirements are burdensome.[27] There is little industry-wide guidance on interconnection, even with regard to the short list of "declared services" which *all* operators – not just Telstra – must provide to any requesting operator at cost-based prices and on reasonable terms and conditions. In fact, Australia's access regime does not oblige Telstra to provide *any*

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[24] / *See* Australia: Schedule of Specific Commitments, GATS/SC/6/Suppl. 3, April 11, 1997 at 6 (*fn.* 1) (*attached as Exhibit A*).

[25] / *Id.*

[26] / *Id.* at *fn.* 2.

[27] / Adele Ferguson, *Dial T for Tyrant*, BRW Investigator, June 8, 2001 (http://www.brw.com.au) (Exhibit 2).

form of access or service that is not listed as a declared service, and Telstra has been able to use the access regime to successfully deny or delay the provision even of declared services.

An additional barrier to new entrants is the uncertainty over rates for access and interconnection to be paid to Telstra. Under its WTO commitments, Australia is required to ensure that Telstra's interconnection rates are cost-oriented and fair and reasonable under the circumstances. However, Telstra consistently demands rates that are well in excess of its costs for providing these services[28], and both the rates themselves -- as well as the proper cost methodology to be used – are the subject of numerous disputes both between Telstra and Australian regulators and Telstra and its competitors. Until these issues are resolved, new entrants are forced to develop business plans and commence operations without any certainty as to their actual costs of interconnecting with Telstra.

This situation is made even worse by Australia's dispute resolution process. Disputes over access and interconnection must be brought before the ACCC for arbitration, which is a slow and expensive process that can take not only months, but years to resolve. The results of these arbitrations can then be appealed, which adds even greater cost and delay and has resulted in a situation where some disputes have yet to be finally decided over four years after arbitration was initiated. Twenty-five interconnection disputes are currently pending before the Australian regulators – a number that would be significantly higher, except that most operators simply cannot afford the legal costs of arbitration with Telstra (Telstra alone spends approximately AU$ 55 million per year on legal advice, much of which is related to appeals against access and/or pricing decisions).[29]

Once a final decision is made in a dispute, it is binding only on the two individual parties to the dispute and both the decision and the results are confidential. Operators are also prohibited from filing for joint or multi-party arbitrations involving common issues. These restrictions thus force competitive operators to re-litigate the same issues over and over, incurring enormous costs and creating tremendous regulatory uncertainty.

With the recent failures of certain prominent competitive operators in Australia, the Australian government has at last recognized the need to overhaul its dispute resolution process. The DCITA recently issued proposed legislation (discussed in more detail below) designed to streamline the arbitration process and to make it more transparent. However, these reforms may only be enacted through the vote of Parliament, which may amend or reject part or all of the proposed changes. In addition, it is not clear whether or when these proposals will ever come before Parliament for a vote, particularly given the national elections coming up in October 2001.

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[28]/ For example, as discussed in Part I.A. above, Telstra insists on a rate of AU$ 38.25 – 63.25 per month for wholesale unbundled local loop access, as well as wholesale line rental rates that match or exceed Telstra's retail rates. This disparity means that Telstra is either charging rates far in excess of cost for local access or is heavily subsidizing its retail access business.

[29] / *See* fn. 26.

A. Australia's Access Regime

Australia implemented its WTO commitments on interconnection through the enactment in 1997 of Part XIC of the Trade Practices Act. Under Part XIC, the ACCC has the power to designate certain carriage and related services as "declared services." All operators who provide declared services, including non-dominant operators, are required to comply with Standard Access Obligations with respect to those services and are required to make any declared service available at cost-based prices[30] and on reasonable terms and conditions to any carrier or service provider seeking it. The ACCC has the power to issue individual and class exemptions from the Standard Access Obligations, although it has not yet done so. The following have been designated as declared services and are covered by the Standard Access Obligations:

- the unconditioned local loop;
- local PSTN origination and termination;
- local carriage;[31]
- ISDN;
- digital data access services; and
- mobile termination services.

The specific terms and conditions for providing access are subject to an individual agreement between operators, as long as the Standard Access Obligations are met. If an agreement cannot be reached, the ACCC will, upon request, arbitrate outstanding issues between the parties and impose the terms of an agreement. Operators may also develop voluntary "access undertakings" (a standard offer) for approval by the ACCC. If the ACCC approves the access undertaking, it will then be used in place of arbitration if an individual agreement cannot be reached between operators.

Under Australia's WTO commitments, Telstra is required to either make copies of its interconnection agreements publicly available or to have a reference standard offer in place. Competitive service providers may then refer either to these other interconnection agreements or

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[30]/ The ACCC has stated that pricing for all declared services should be based on a forward-looking total service long run incremental cost ("TSLRIC") method and on a geographically de-averaged basis. There have been several disputes between Telstra and other carriers concerning the prices for Telstra's declared services. The ACCC is still working on these pricing issues.

[31]/ On September 13, 2001, the ACCC announced a Draft Decision to deregulate wholesale local call services in the Central Business Districts ("CBD") of Sydney, Melbourne, Brisbane, Adelaide and Perth. The ACCC has determined that "enough alternative facilities have been developed" in these areas and that unbundled local loop services are "available at geographically de-averaged rates," thus ensuring that there will be competition in the provision of local call services in these CBDs. The ACCC is accepting comments on this draft decision through Friday, October 12, 2001. If adopted, this decision will not go into effect until one year after it is finalized. *See* ACCC Media Release MR 222/01, *ACCC to Deregulate Wholesale Local Call Services in CBD Areas of Major Capital Cities*, September 13, 2001.

to the standard offer when entering into their own interconnection agreements with Telstra. However, Telstra has neither made its existing agreements publicly available nor finalized or published a standard offer. In 1997, Telstra submitted three proposed access undertakings to the ACCC for originating and terminating access (interconnection) to the public switched telecommunications network ("PSTN"), GSM mobile and AMPS mobile networks. After extensive review, all three undertakings were rejected by the ACCC in 1999 for containing unreasonable non-price terms and conditions. Telstra then submitted a new proposed access undertaking for interconnection to its PSTN network. This proposal was rejected in July 2000 for what the ACCC considered to be unreasonable and non-cost based pricing.

In order to comply with its WTO obligations and eliminate the current regulatory and market uncertainty that is inhibiting fair and effective competition, Australia must take certain steps to address the problems discussed above. First and foremost, Australia must either establish a final reference interconnection offer ("RIO," also referred to as an access undertaking) for Telstra or make Telstra's existing interconnection agreements publicly available in their entirety. However, the government should continue to refuse to accept any proposed RIOs submitted by Telstra which contain unreasonable and/or non-cost-oriented rates, terms and conditions. Therefore, the ACCC must have the power to set a firm deadline for Telstra to submit a RIO, after which the ACCC may impose its own RIO terms on Telstra. This approach has already proven successful in the United Kingdom and Ireland because it eliminates the incentive for incumbents such as Telstra to continuously propose unreasonable terms in order to delay the enactment of a binding RIO. Alternatively, making Telstra's existing interconnection agreements publicly available would also bring Australia into compliance with its WTO obligations, although this will only be effective if the government adopts a strict and high standard as to what information may be withheld in the interests of commercial confidentiality.

In addition, Australia's regulators should establish clear, concise guidelines and guidance materials concerning access and interconnection. Such guidance would greatly simplify and encourage commercial negotiations between telecommunications operators and diminish the possible need for future dispute resolution. Operators would no longer be forced to waste time and resources muddling through the "rules of the game" and would instead be able to efficiently reach commercially sound agreements with each other. An excellent starting point would be the reduction and simplification of Telstra's current documents on interconnection prices and procedures.

Australia must also, once and for all, establish rates for access that are *final* and *cost-based.* The Australian telecommunications market has been open to competition for over four years, yet new entrants still do not know how much they must pay for access to Telstra's network. For example, in July 2001, documents were leaked revealing that Telstra had filed a confidential complaint with the ACT over an ACCC arbitration ruling that set Telstra's network access fees at AU$ 0.0177 per minute for 1999/2000 and AU$ 0.0153 per minute for 2000/2001.[32] In its complaint, Telstra is reportedly seeking a ruling that would *retroactively* raise these fees to AU$ 0.0233 per minute for 1999/2000 and AU$ 0.021 per minute for

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[32] / Mike Newlands, *Optus' New COO Wades into Telstra*, Total Telecom, August 7, 2001 (http://www.totaltele.com) (Exhibit 2).

2000/2001, plus an additional per-minute surcharge.[33] No one is certain when a decision by the ACT can be expected.

Finally, Australia should re-examine the standards they apply when deciding whether to remove a particular service from the list of declared services. The current standards have allowed the deregulation of services, such as certain intercapital transmission services, that show only the *potential* for competition in the future, even though effective competition does not yet exist.[34]

Taken together, these measures would be a significant step toward curbing Telstra's abusive market behavior, firmly establishing fair and effective competition, and bringing Australia into compliance with the obligations it made to the WTO in 1997. However, these measures alone are not sufficient to address the other problems discussed below with Australia's current telecommunications regulatory environment.

B. Dispute Resolution

2.4 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse either:

(a) at any time or

(b) after a reasonable period of time which has been made publicly known

to an independent domestic body. . . to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

- WTO Reference Paper

If an operator has a dispute over interconnection with Telstra, then it should have recourse either at any time or after a reasonable period of time to an independent domestic body that will then be obligated to resolve disputes about appropriate terms, conditions and rates for interconnection within a reasonable period of time. Australia stated in particular that terms and conditions of access will be established primarily through processes of commercial negotiation or by reference to access undertakings given by access providers which may draw upon an industry code of practice approved by the independent regulator. Australia also stated that an independent arbitrator will make a decision based on transparent criteria to ensure that rates are fair and reasonable, and will resolve disputes about relevant costs.

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[33] / *Id.*

[34] / *See, e.g.,* ACCC Media Release MR 56/01, *ACCC Issues Draft Decision to Deregulate Intercapital Telecommunications Transmissions*, March 19, 2001.

As discussed above, the ACCC fulfils the role of the independent arbitrator required under Australia's WTO commitments, with responsibilities that include arbitration of access and interconnection disputes, approval of standard offers and pricing and cost issues concerning declared services. These responsibilities are in addition to the ACCC's role as the "competition watchdog" and enforcer not only for telecommunications, but for all sectors of Australia's economy.

As a practical matter, however, the scope of access and interconnection issues which may be brought before the ACCC for arbitration is limited to the provision of declared services, since all non-declared services are considered by Australia to be subject strictly to commercial negotiation between the parties. Unlike in the United States or in Europe, where arbitrations and dispute resolution proceedings carried out by state or national regulatory authorities are subject to strict timelines, ACCC arbitration proceedings can continue for months or even years before a final decision is issued. The costs to operators of taking part in such lengthy proceedings are very high, in terms of both time and resources, and have proven prohibitively expensive for many new entrants.

An arbitration in Australia is a private – rather than public – proceeding that is initiated when one party lodges an "access dispute" with the ACCC, along with a fee of AU$ 10,000. As discussed in previous sections, both the arbitration proceedings and the decisions themselves are strictly confidential and may not be disclosed to anyone other than the individual parties to the dispute. A party may also request that the ACCC withhold certain information from the other party based on confidentiality. The ACCC may choose to hold private hearings or conduct "roundtable" discussions to help resolve or flesh out key issues, and the ACCC encourages the parties to file comments on each other's submissions. However, all of this is carried out under the ACCC's strict rules of confidentiality. Parties breaching the confidentiality of arbitrations are subject to penalties that include fines and/or imprisonment.

The ACCC must issue a final determination in each arbitration, although it may issue an interim determination that will expire upon issuance of the final determination. Before either an interim or final determination can be issued, the ACCC must seek submissions from the parties on a draft of that determination. In general, it has taken the ACCC from six to 18 months on average to reach a final determination.

The results of an arbitration apply only to the individual parties, and the full text of the determination, including the arguments set forth and the reasoning behind the ACCC's decision, is available only to the individual parties and is also covered by the confidentiality rules. Because competitive operators have no way of discovering how the ACCC has ruled in previous disputes over similar issues, they must essentially re-litigate these issues from scratch and risk wasting both time and resources in deciding whether to litigate issues that may have already been decided.

Once the ACCC makes a decision, whether in an arbitration or in any other proceeding, its decision may be appealed to the ACT. As with the ACCC, the ACT hears disputes arising from all sectors of the Australian economy, not just telecommunications. An appeal to the ACT adds significantly to the cost and delay of obtaining a final resolution. During an appeal, the ACT not only reviews all aspects of the record of the arbitration or other proceeding, but may

also accept new evidence and arguments not previously addressed by the ACCC, thus making the ACT review effectively a re-arbitration of the dispute. The ACT appeals process alone can take up to two years or more. For instance, in October 2000, Telstra appealed the ACCC's final decisions in two long-running arbitrations, and the ACCC does not expect a ruling from the ACT "until mid-2002 at the earliest."[35] Decisions of the ACT can then be further appealed in Australia's federal courts.

Meanwhile, as appeals are pending, any lower agency decision is stayed until the appeals process ends. Telstra has been able to continuously use this process to delay adverse access and pricing decisions for up to five years or more. For example, Telstra appealed a 1997 ACCC decision on the price that competitive provider One.Tel had to pay Telstra for PSTN access and interconnection fees. Four years later, the ACT has yet to issue a decision on this case, and One.Tel has since filed for bankruptcy and is being dissolved. Similarly, nearly every competitive operator in Australia has been attempting to provide services without knowing for anywhere from two to five years what these services will actually cost. Most recently, Telstra filed a confidential complaint with the ACT in July 2001 seeking a ruling that would overturn an ACCC arbitration decision on Telstra's wholesale network access fees and retroactively *raise* the fees charged for 1999 – 2001 *by 32 to 38 percent* plus add an additional per-minute surcharge![36] This creates an enormous amount of market uncertainty that acts as a strong deterrent to the rollout of competitive telecommunications services, the development of new and innovative services and the entry of new players into the marketplace.

Overall, the sole beneficiary of Australia's current dispute resolution process is Telstra, the former monopoly operator and dominant incumbent. The high costs, excessive delays and regulatory uncertainty engendered by the dispute resolution process all work to the advantage of Telstra, which can easily use its nationwide legacy network and vast resources to out-wait and exhaust its competitors.

Fortunately, due to the recent failure of One.Tel, one of Australia's major competitive telecommunications companies, the Australian government has been forced to recognize and attempt to redress the shortcomings in its current arbitration regime. On June 26, 2001, telecommunications policy-maker DCITA proposed new legislation intended to streamline the arbitration process, making it more efficient and transparent. As the DCITA noted in its press release announcing the proposals: "Protracted delays in the arbitration of access disputes are impeding competition in the telecommunications sector . . . This reform package is designed to further encourage commercial negotiations in the resolution of access disputes . . . and to speed up the arbitration process should commercial negotiations fail."[37]

Under the DCITA's proposed legislation, the ACCC would be empowered to conduct multilateral arbitrations, thus allowing several operators with similar issues to join together in a single proceeding. In addition, the ACCC will be permitted to publish both the results and reasoning of interim and final arbitration decisions – thus removing the cloak of confidentiality –

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[35] / *See* fn. 21.

[36] / *See* fn. 32 and discussion in Part II.A. above.

[37] / DCITA Media Release, *Streamlining the Telecommunications Access Regime*, June 26, 2001.

and will also be allowed to use information gathered during an arbitration proceeding in subsequent proceedings. These measures, if adopted, will have a tremendous impact on encouraging new market entry and effective competition by substantially lowering arbitration costs and greatly increasing both regulatory and market certainty. They also serve to provide a more level playing field for commercial negotiations.

The DCITA's proposals also address the problem (discussed above) of delays and uncertainty caused by appeals to the ACT and/or Australia's federal courts. Specifically, the DCITA proposes limiting the scope of evidence that the ACT may consider in reviewing an ACCC arbitration decision to "that which was available to the ACCC in making the determination," although evidence that had been deliberately withheld from the ACCC may still be introduced. This is expected to significantly reduce the time it takes for the ACT to carry out its review and issue its decision. Further, any operator receiving an unfavorable decision from the ACT will *not* be able to have that decision (or decisions by the ACCC) stayed during the conduct of federal court appeals.

The DCITA proposal also includes procedural reforms intended to streamline the arbitration process. For example, the proposal calls for allowing arbitrations to be conducted by a single ACCC Commissioner (rather than by at least two Commissioners, as currently required) in order to increase efficiency. The DCITA also seeks to limit opportunities for operators to engage in "strategic abuse" of the arbitration system in order to gain leverage in negotiations. Specifically, the DCITA proposes empowering the ACCC to backdate the effective date of arbitration decisions to the date of commencement of negotiations between the parties, rather than to the date of notification of the dispute to the ACCC. The DCITA also proposes to allow pending disputes to be withdrawn only with the consent of either both parties or of the ACCC, thus eliminating the stratagem of notifying a dispute, forcing the other side to go through a long and costly arbitration, and then withdrawing the dispute immediately prior to the issuance of a final determination.

Overall, the DCITA's proposals represent a positive step toward addressing some of the barriers to competitive entry in Australia's telecommunications market. They also demonstrate recognition by the Australian government of at least some of the inequities of the current regulatory system. However, it must be emphasized that these are proposals only, and that they must be formally adopted and enacted by the Australian Parliament before they can take effect. Telstra has already indicated resistance to some if not all of these proposed reforms, claiming that any increase in the ACCC's powers would only increase delays in dispute resolution.[38] Telstra has already proposed its own plan for clearing the arbitration backlog, and may be expected to heavily lobby members of Parliament (particularly among the Labor party, where Telstra enjoys strong support) to either block or dilute the DCITA's proposals. In addition, despite the DCITA's declared urgency of the need for these reforms, there is a good chance that they might not be debated or voted on by the end of this legislative session due to the national election in October 2001, which is expected to be hotly contested (the opposition Labor Party needs only seven seats to retake control of the government).

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[38] / *One.Tel Collapse May Ring Competition Changes*, Total Telecom, May 31, 2001 (http://www.totaltele.com) (Exhibit 2).

The Australian government -- including not just the DCITA but the entire Parliament -- should be encouraged to adopt these reforms as quickly as possible and not let them get pushed off or diluted in the current politically-charged environment. Although many additional problems remain to be addressed, adoption of these reforms would be a significant step toward bringing Australia's regulation of its telecommunications sector into compliance with the commitments Australia made to its WTO trading partners in 1997.

III. Independent Regulator

5. Independent regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

- WTO Reference Paper

As a signatory to the Reference Paper, Australia's telecommunications regulator must be independent of and not susceptible to political or other pressure on behalf of any single carrier. This is an especially important feature in countries such as Australia where the government still holds a significant or controlling interest in the nation's dominant telecommunications operator.

Currently, the Australian government holds 50.1% of Telstra. The government's share is jointly administered by the DCITA and the Department of Finance and Administration, and the Minister who heads the DCITA also serves as Parliament's Minister for Telstra and as the voting shareholder on behalf of the Australian Commonwealth. Although the government plans ultimately to sell off its interest and completely privatize Telstra, these plans have been put on hold by Parliament, whose members are concerned with shoring up Telstra's market value and ensuring funding of additional rollout of rural infrastructure by Telstra. The DCITA therefore has a clear conflict between its role as the policy-maker and overseer of telecommunications competition and its responsibility for maintaining Telstra's value.

As discussed in the Background Section above, telecommunications regulation is handled primarily by the Australian Communications Authority, which is a subsidiary part of the DCITA, and by the ACCC, whose scope of authority in the telecommunications sector is determined by legislation developed by the DCITA. This ultimately makes both of these regulatory bodies answerable to or dependent on the DCITA, Telstra's largest voting shareholder.

The need for a truly independent regulator is also demonstrated by the politicization of Telstra in the Australian Parliament, particularly in the run-up to Australia's nation-wide elections this fall. Kim Beazley, the leader of the opposition Labour Party, has even made keeping the government's majority-ownership of Telstra a central campaign promise and plans to require every Labour candidate to "sign a written pledge to retain government control of Telstra."[39] In a recent campaign meeting, Mr. Beazley stated that the government's majority-

[39] / Mike Newlands, *Australian Politician Calls for Continued Control of Telstra*, Total Telecom, July 20, 2001 (http://www.totaltele.com) (Exhibit 2).

ownership "gives us the capacity to influence the direction in which Telstra goes and the decisions they take. This is critical now to regional development."[40] With the Labour Party needing to gain only seven seats to win majority-control of the government, Mr. Beazley is considered to be "a strong contender" to become Australia's next Prime Minister[41] and would have the power to steer Australia's telecommunications policy and regulatory regime to the benefit of Telstra.

CONCLUSION

Four years since agreeing to open its telecommunications market to competition, it has become clear that Australia has not lived up to the commitments it made to its WTO trading partners. While most licensing barriers to market entry have been largely eliminated, Australia's current telecommunications regulatory environment has created – and even exacerbated – numerous regulatory and economic barriers to market entry and the development of effective competition, and several aspects of Australia's current regulatory regime contravene its WTO commitments.

As a result of Australia's failure to meet its WTO commitments, competitive telecommunications carriers, including several with substantial U.S. investment, have been seriously impeded in their ability to compete in the Australian market. We therefore request the USTR to engage in discussions with the Australian government directed at bringing Australia into compliance with its WTO commitments and ensuring fair and effective competition in the Australian telecommunications market. The upcoming negotiations for a possible US-Australia Free Trade Agreement will provide an excellent forum for such discussions and will hopefully result in meaningful progress.

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[40] / *Id.*

[41] / *Id.*